

The opinion in support of the decision being entered
today was *not* written for publication and is *not*
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Paper No. 44

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEVIN C. SPENCER

Appeal No. 1997-0151
Application 08/169,542

HEARD: AUGUST 15, 2000

Before GARRIS, OWENS and LIEBERMAN, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the examiner's final rejection of claims 25, 32 and 40, and refusal to allow claims 23, 31, 33 and 36-39 as amended after final rejection. These are all of the claims remaining in the application.

THE INVENTION

Appellant's claimed invention is directed toward a method for increasing the rate of a browning reaction during the

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heating of baked goods. Claim 40 is illustrative and reads as follows:

40. A method of increasing a rate of a browning reaction in food during heating thereof to produce a baked good, which comprises heating said food under an atmosphere consisting essentially of argon, neon, krypton or xenon or a mixture thereof at a pressure of up to about 3 atm.

THE REFERENCES

Segall 1972	3,677,024	Jul. 18,
Strobel et al. (Strobel) 1990	4,971,813	Nov. 20,
McKenna et al. (McKenna) 1991	5,021,251	Jun. 4,

THE REJECTIONS

Claims 23, 25, 31-33 and 36-40 stand rejected under 35 U.S.C. § 103 over appellant's admitted prior art taken together with Segall, and also over McKenna taken together with Strobel, appellant's admitted prior art and Segall. Claim 36 stands rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which

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appellant regards as the invention.

OPINION

The rejection of claim 36 under 35 U.S.C. § 112, second paragraph, is based upon the claim being indefinite due to its dependence from a canceled claim, i.e., claim 35 (answer, page 4). We summarily affirm this rejection because it is not contested by appellant.

Regarding the rejections under 35 U.S.C. § 103, we have carefully considered all of the arguments advanced by appellant and the examiner and agree with appellant that these rejections are not well founded. Accordingly, we reverse the rejections under 35 U.S.C. § 103. We need to address only appellant's sole independent claim, which is claim 40.

*Rejection under 35 U.S.C. § 103 over
appellant's admitted prior art taken with Segall*

The examiner argues that appellant acknowledges on pages 1 and 2 of the specification that it was known in the art to use inert gases to control pressure in the process of heating

milk (answer, page 4). Such a use of inert gas, the examiner argues, indirectly controls browning reactions. See *id.* The examiner, however, provides no evidence that the term "baked good" in appellant's sole independent claim encompasses milk. Also, the examiner has not established that any control of a browning reaction of milk caused by the inert gas would increase the rate of the browning reaction as required by appellant's independent claim.

Segall discloses a method for preserving foodstuffs such as fruits, vegetables, meats, fish and the like by placing them in a chamber which is pressurized with an inert gas which can be a noble gas such as neon or argon, and cooling the chamber to about -20°C (col. 1, lines 59-65; col. 2, lines 14-50).

The examiner argues that Segall treats foods with noble gases to control color changes in the foods and that, therefore, it would have been obvious to one of ordinary skill in the art to manipulate the parameters of the process, including pressure, by changing the gas pressure to cause an increase in browning (answer, pages 4-5). The preservation of

foodstuffs by the Segall process, however, appears to decrease the rate of a browning reaction rather than increase it as required by appellant's claims. Furthermore, the examiner has not explained why one of ordinary skill in the art would have been led by the prior art to apply Segall's preservation method during the heating of baked goods.

For the above reasons, we conclude that the examiner has not carried the burden of establishing a *prima facie* case of obviousness of the claimed invention over appellant's admitted prior art in view of Segall.

Rejection under 35 U.S.C. § 103 over McKenna taken with Strobel, appellant's admitted prior art and Segall

McKenna discloses a method for preserving lemon juice in the absence of a sulfiting agent by adding to the lemon juice 1) sodium benzoate, 2) one or more of ascorbic acid, sodium acid pyrophosphate, glucose oxidase and sodium hexametaphosphate, and 3) an inert gas (col. 1, lines 42-52; claim 1). This treatment, McKenna teaches, inhibits browning of the lemon juice (col. 1, lines 51-52).

Strobel discloses mashing apples and removing the juice

in a process wherein oxygen is excluded by blanketing the apparatus with a non-reactive, non-oxidative gas which can be argon, so as to avoid or reduce oxidation and/or browning reactions in the mash (col. 5, lines 52-64).

The examiner argues that although neither McKenna nor Strobel discloses controlling the browning of baked goods, it is well known to employ browning techniques in baked goods (answer, page 7). In support of this argument the examiner relies upon appellant's acknowledgment (specification, page 1) that the Maillard reaction is involved in the nonenzymatic browning of foods during cooking (answer, page 7). The examiner points out that the applied prior art does not disclose increasing the rate of the browning reaction, but argues that it was well known to promote browning reactions (answer, page 8).

The examiner, however, does not explain why the applied prior art itself would have led one of ordinary skill in the art to heat baked goods in an atmosphere which consists essentially of the noble gases recited in appellant's claim 40. See *In re Rinehart*, 531 F.2d 1048, 1051, 189 USPQ 143,

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147 (CCPA 1976). All of the references relied upon by the examiner concern reducing the rate of a browning reaction rather than increasing it as required by claim 40, and none of the references pertain to baked goods. To arrive at appellant's claimed invention the examiner has used impermissible hindsight in view of appellant's disclosure of the invention in his specification. See *W.L. Gore & Assocs. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984); *In re Rothermel*, 276 F.2d 393, 396, 125 USPQ 328, 331 (CCPA 1960). Accordingly, we conclude that the examiner has not carried the burden of establishing a *prima facie* case of obviousness of appellant's claimed invention over McKenna taken together with Strobel, appellant's admitted prior art, and Segall.

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DECISION

The rejection of claim 36 under 35 U.S.C. § 112, second paragraph, is affirmed. The rejections of claims 23, 25, 31-33 and 36-40 under 35 U.S.C. § 103 over appellant's admitted prior art taken together with Segall, and over McKenna taken together with Strobel, appellant's admitted prior art and Segall, are reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

	Bradley R. Garris)	
	Administrative Patent Judge)	
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	Terry J. Owens)	BOARD OF
PATENT)	
	Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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Paul Lieberman)
Administrative Patent Judge)

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